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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RANDI REBHAN, Plaintiff and Respondent, v. ATOLL HOLDINGS, INC., Defendant and Appellant.	2d Civil No. B140612 (Super. Ct. No. CV 077435) (San Luis Obispo County)

In this disability discrimination case, employer Atoll Holdings, Inc., also known as Escorp (hereinafter Escorp), fired Randi Rebhan from her job as a receptionist because she had a negative reaction to the insulin she was taking to control her diabetes and blacked out. She sued under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.)[1] The court found in favor of Rebhan and awarded her damages of $61,232. The court also granted Rebhan's motion for attorneys fees and costs, awarding her attorneys $418,074. (§ 12965, subd. (b).) Escorp appeals from the judgment contending that Rebhan's case lacked substantial evidence. Escorp also challenges the 1.75 multiplier used to enhance the fees awarded to Rebhan's trial counsel. We reverse and remand the fees award but otherwise affirm.

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[1] All statutory references are to the Government Code unless otherwise indicated. Section 12940, subdivision (a) makes it an unlawful employment practice for an employer "because of the . . . physical disability . . . of any person, . . . to discharge the person from employment . . . ."

FACTS AND PROCEDURAL BACKGROUND

Rebhan worked for Escorp for nine years. For most of those nine years she worked in accounting. After company-wide layoffs, she assumed the additional responsibility of acting as Escorp's receptionist. She was a receptionist for 14 months before she was fired.

Rebhan has insulin-dependent diabetes mellitus.[2] This condition requires Rebhan to test her blood sugar levels several times a day, to inject insulin three times a day, and to follow a strict diet and exercise plan. Rebhan also suffers from diabetic hypoglycemia, a common side effect of insulin, where the blood sugar level drops too low.[3] Rebhan's physician explains that diabetic hypoglycemia is unpredictable. A diabetic cannot precisely judge the amount of insulin to inject or how it will be absorbed given life variables such as stress, exercise, and variations in diet. Signs of the onset of diabetic hypoglycemia are answering questions slowly or inappropriately, staring off into space, losing concentration, experiencing lapses in memory, and in severe cases, losing consciousness.

Rebhan experienced several insulin reactions during the nine years that she worked for Escorp. Her supervisor described Rebhan during these reactions as assuming a "catatonic state." While Rebhan minimized the frequency of these reactions, her supervisor estimated that Rebhan had an insulin reaction once a month. In most cases, with the help of her coworkers and supervisor, Rebhan resolved these incidents by eating or drinking something to boost her blood sugar. These incidents did not prevent her from working at Escorp.

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[2] Diabetes mellitus is "a chronic syndrome of impaired carbohydrate, protein, and fat metabolism owing to insufficient secretion of insulin or to target tissue insulin resistance." (Dorland's Illustrated Medical Dict. (28th ed. 1994) pp. 456-457.)

[3] Hypoglycemia is "an abnormally diminished concentration of glucose in the blood, which may lead to tremulousness, cold sweat, piloerection, hypothermia, and headache, accompanied by irritability, confusion, hallucinations, bizarre behavior, and ultimately, convulsions and coma." (Dorland's Illustrated Medical Dict., *supra*, at p. 806.)

In November 1993, while answering the telephones, Rebhan had a severe insulin reaction and lost consciousness. When she regained consciousness, she saw flashing lights on the switchboard and her supervisor and Escorp's president, Henry Harbers, standing next to her.

Later that day, Rebhan, her supervisor, and Harbers discussed the incident. Harbers encouraged her to test and snack to avoid another incident. He also wanted to talk to her doctor. Rebhan did not object. Rebhan's doctor told Harbers how Rebhan controlled her disease, explaining in general her diet and blood monitoring regimen. Harbers asked the doctor for Rebhan's treatment regimen. The doctor refused to furnish it without first obtaining Rebhan's consent. In a letter to Harbers, Rebhan denied his request. She suggested as an alternative solution that "[m]aybe we could work something out where I'm not on the phones all day." Harbers never responded to the letter. Instead, at Harbers' request, Rebhan's supervisor prepared a written warning. The warning stated that Rebhan was put on "notice that the next time [she was] unable to perform [her] duties as receptionist, due to [her] having a diabetic episode where [she fell] into a catatonic state, [Escorp would] be forced at that time to terminate [her] employment."

Seven months later Rebhan had an insulin reaction at work and lost consciousness. She had been relieved at the reception desk and was working at her desk in the accounting department where her supervisor found her slumped in a chair. Rebhan was terminated at the end of the day because she "was unable to perform her duties this morning as she had a diabetic episode."

In a written statement of decision, the trial court found that Rebhan had been unlawfully terminated based on her disability. It reached this conclusion by reasoning that Rebhan had a disability under FEHA because without insulin she would lapse into a coma, thus her diabetes limited her in every major life activity. It rejected Escorp's argument to consider Rebhan in her medicated condition. In doing so, the court concluded that the United States Supreme Court decision in *Sutton v. United Airlines, Inc.* (1999) 527 U.S. 471 (*Sutton*), defining a disability under the Americans with Disabilities Act of 1990 (ADA; 42 U.S.C. § 12101 et seq.), did not apply to the FEHA.

The court further found that Rebhan was qualified to perform her duties as a receptionist with or without reasonable accommodation, and that Escorp failed to make a reasonable accommodation for Rebhan.

DISCUSSION

Standard of Review

On review, the judgment is presumed valid and all conflicts in the evidence must be resolved in favor of the prevailing party. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398.) "'. . . ". . . [T]he power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." . . . '" (*Estate of Teel* (1944) 25 Cal.2d 520, 526-527.)

Disability Discrimination

In a case of disability discrimination under FEHA, Rebhan must show that she (1) has a disability; (2) is qualified to perform the duties of receptionist with or without reasonable accommodation; and (3) has suffered an adverse employment action because of the disability. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.) Escorp contends that Rebhan did not meet her burden to prove the first and second criteria. We disagree.

Disability Under FEHA

When Rebhan was fired (and when the case was tried), FEHA defined physical disability as any actual or perceived "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss" that both affects the "neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine" systems of the body, and that "[l]imits an individual's ability to participate in major life activities." (Former § 12926, subd. (k), enacted by Stats. 1992, ch. 913,

§ 21.3.)

Escorp contends that the trial court erred in concluding Rebhan established the second requirement of a disability, i.e., that Rebhan's diabetes limited her ability to participate in major life activities. According to Escorp, the court should have made that determination by looking at her medicated condition in accordance with the federal definition announced in *Sutton*. Escorp urges that we adopt *Sutton* to define a disability under FEHA.[4] The Legislature rejected *Sutton* when it substantially revised the disability provisions of the FEHA, amending section 12926 and adding section 12926.1, effective January 1, 2001. (Stats 2000, ch. 1049, § 6.) The FEHA now states that a qualifying disability is determined without regard to mitigating measures.[5] The question of whether this amendment and the addition of section 12926.1 apply retroactively is currently before our Supreme Court. (*Colmenares v. Braemar Country Club, Inc.* (Aug. 2, 2001, S098895) ___ Cal.4th ___ [01 D.A.R. 9054] [plain language of statute indicates change in law to be applied prospectively]; see contra, *Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205 [plain language of statute clarifies existing law to be applied retroactively].) Even if our Supreme Court concludes the FEHA amendments and addition are prospective only, Escorp's position would not be advanced.

In *Sutton*, the United States Supreme Court held that under the ADA, corrective and mitigating measures should be considered in determining whether an individual is substantially limited in a major life activity. (527 U.S. at pp. 482-488; see

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4 Rebhan argues to the contrary and asks that we take judicial notice of a decision by the Fair Employment Housing Commission denouncing *Sutton*'s impact on the FEHA, along with former section 12926. We do so but find the decision of little or no precedential value. (Evid. Code, §§ 452, subds. (a), (b), 459.)

5 Section 12926.1 provides in part: "(c) [T]he Legislature has determined that the definition[] of 'physical disability' . . . under the law of this state require[s] a 'limitation' upon a major life activity, but do[es] not require, as does [the ADA], a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity . . . ."

Section 12926, subdivision (k) now reads: "For purposes of this section: [¶] (i) 'Limits' shall be determined without regard to mitigating measures . . . ."

also *Murphy v. United Parcel Service, Inc.* (1999) 527 U.S. 516, 521; *Albertson's, Inc. v. Kirkingburg* (1999) 527 U.S. 555.) But the court noted that the use of corrective measures did not end the inquiry. "Rather, one has a disability . . . if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity." (*Sutton, supra*, at p. 488.) There is no doubt that Rebhan is disabled in her unmedicated condition. But, unlike *Sutton* or *Murphy*, even in her medicated condition, the record shows that Rebhan is limited in one or more major life activities.

The risk associated with insulin reactions did not prevent Rebhan from working or participating in life activities, but her participation in these activities was far different than individuals without complications from diabetes. Even when taking insulin, Rebhan constantly monitored her blood sugar to prevent fluctuations. When her blood sugar dropped, she had to stop all other activities and do whatever was necessary to bring her blood sugar back to normal. If she did not, she could lose consciousness. She could minimize but not eliminate these reactions. As a result, even in her medicated condition, Rebhan's disease required constant vigilance. For example, although she is not prohibited from driving a car, she has to test her blood sugar level before she does so to ensure that she will not have an insulin reaction while driving. As noted by the trial court, Rebhan is unlike the Sutton twins before the United States Supreme Court whose myopia was neutralized by wearing corrective lenses. The insulin or corrective measure she took to control diabetes neutralized that disease but created a complication that limited her ability to participate in life activities. The trial court's legal conclusion to the contrary, that in her "after condition" Rebhan is not substantially limited in any life

activity, is contrary to findings in its written statement of decision.[6] (See *Estate of Teel, supra*, 25 Cal.2d at pp. 526-527.)

We reject Escorp's contention that even though Rebhan had insulin reactions, she was not limited in the major life activity of working (the only activity Rebhan identified until after trial). (Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a).)[7] She meets this requirement even under the more onerous standard of the federal act, i.e., that a qualifying disability must prevent one from working at a class of jobs or a broad range of jobs in various classes. (*Sutton, supra*, 527 U.S. at pp. 491-492; see also Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a).) Contrary to Escorp's contention, Rebhan was not limited from the narrow range of jobs that required her to "answer[] the telephone in an unsupervised environment." If Rebhan lost consciousness, she would be limited in working at any unsupervised job from teacher to assembly line worker, from grocery checker to lawyer. Escorp points to Rebhan's ability to perform her accounting job at the company and her current job. Both are supervised jobs. Likewise, the cases cited by Escorp are inapposite. All deal with working at a particular job, not as here, working at a broad range of jobs. (E.g., *Maloney v. ANR Freight System, Inc.* (1993) 16 Cal.App.4th 1284, 1287 [truck driver unable to meet employer's requirements which required overnight hauls].)

Regarded as Having a Disability

Assuming Rebhan's insulin reactions do not meet the statutory definition of an actual disability, the record shows that Escorp regarded her as disabled. Under the

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[6] The court states: "Because this plaintiff took her insulin shots as prescribed, frequently and competently tested her blood sugar, ate the appropriate diet at the scheduled times, and exercised regularly and faithfully, there is little to differentiate her and a normal, nondiabetic person. Even with her considerable palliative efforts, however, she is not normal as she has the occasional hypoglycemic episode. She is not quite like the sisters Sutton and Hinton. . . . Their only problem could arise from needing a new prescription or forgetting, losing or breaking the pair to be worn that day. . . . It is rather like a case of the flu. Hypoglycemia is not so benign if it goes undetected, but if detected, the condition is not difficult to treat and correct."

[7] Escorp concedes in its brief that the FEHA requires a "limitation" of a major life activity rather than a "substantial limitation," the federal standard, and the one used by the trial court in reaching its decision.

FEHA, an individual regarded as disabled suffers from certain specified physical disabilities or has a condition with "no present disabling effect" but which "may become a physical disability . . . ." (Former § 12926, subd. (k)(3), (4).) A person is regarded as disabled if the employer mistakenly believes (1) "'. . . ". . . that a person has a physical impairment that substantially limits one or more major life activities, or (2) . . . that an actual, nonlimiting impairment substantially limits one or more major life activities." . . .'" (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 259-260.) Since Rebhan relied on working as the major life activity, she had to prove that Escorp regarded her as precluded from a broad class of jobs. Notwithstanding Escorp's contrary arguments, Harbers' discussion with Rebhan's doctor, his approval of the disciplinary warning issued to Rebhan after the November incident, and most importantly, Escorp's decision to terminate Rebhan following an insulin reaction while she was not answering the telephones, is sufficient evidence to demonstrate that Escorp perceived Rebhan as unable to work if she continued to have insulin reactions. This conclusion is consistent with the court's factual findings, despite its legal conclusion to the contrary.

Qualified to Perform Essential Functions

Escorp contends that Rebhan failed to prove that she is qualified with or without reasonable accommodations to perform the essential functions of a receptionist, the second criterion of her prima facie case. (*Brundage v. Hahn, supra,* 57 Cal.App.4th at p. 236.) Escorp argues that even with reasonable accommodations, Rebhan cannot perform her job. During oral argument, Escorp's counsel repeatedly argued that there was no accommodation it could have made. According to Escorp, since Rebhan's insulin reactions were unpredictable, no accommodation would have enabled her to perform the essential functions of (1) acting as a gatekeeper for the company, (2) greeting visitors, and (3) answering telephones. The record is to the contrary.

Escorp fired Rebhan because she had an insulin reaction while working in the accounting department. She was not performing any of the functions described above. Moreover, Escorp never claimed that Rebhan's insulin reactions prevented her from acting as a gatekeeper or greeting visitors. It was concerned with her inability to

answer incoming telephone calls during an insulin reaction. Two accommodations would have enabled her to do so in the event she had an insulin reaction, an answering machine or a modification to the telephone system so that calls could be forwarded to another number.

Escorp's reliance on *Gomez v. American Bldg. Maintenance* (N.D.Cal. 1996) 940 F. Supp. 255, for the proposition that an answering machine eliminated an essential function of Rebhan's job, is misplaced. In *Gomez,* the plaintiff could not perform an essential function of his job as a janitor with or without accommodations. Unlike the plaintiff in *Gomez,* Rebhan was able to answer the telephones. A modification of the telephone equipment would have been a backup system if she had an insulin reaction.

Reasonable Accommodation

Escorp contends that Rebhan's refusal to release her treatment regimen relieved it of any further requirement to determine a reasonable accommodation. Relying on *Beck v. University of Wisconsin Bd. of Regents* (7th Cir. 1996) 75 F.3d 1130, 1135, it contends that it lacked the necessary information and did not know exactly what accommodations were necessary to accommodate her disability. We are not persuaded.

As stated in *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 949-950, once the employee has given the employer notice of a disability, "'. . . This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. . . . Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions.'" (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385.) In *Jensen v. Wells Fargo Bank, supra,* 85 Cal.App.4th at pages 262-263, the court concluded that in order for the employer to prevail on a failure to accommodate claim, the employer must show it did "everything in its power to find a reasonable accommodation, but the informal, interactive process broke down because the employee failed to engage in discussions in good faith." Escorp failed to make the necessary showing.

It was Escorp not Rebhan who refused to participate in the interactive process. Escorp stopped communicating with Rebhan after she declined Harbers' request to release her treatment regimen. At trial, Escorp maintained that Rebhan's request to be relieved on the telephones was not reasonable. But it never communicated that to Rebhan. Nor did it propose an alternative. Escorp claims that like the university in *Beck v. University of Wisconsin Bd. of Regents, supra*, 75 F.3d at page 1135, it did not have the information to propose an alternative accommodation. This is belied by the record. Rebhan's doctor gave Harbers enough information for him to understand Rebhan's condition so that it could attempt to engage in a process to accommodate her.

Alternatively, Escorp claims that it did everything it was required to do under the statute to reasonably accommodate Rebhan. It contends that other than have another person perform Rebhan's job functions, there is no accommodation that it could have made. (Cal. Code Regs., tit. 2, § 7293.9 et seq.) Moreover, Escorp argues that it had no obligation to implement the accommodations raised at trial and relied upon by the trial court because none was reasonable. We agree with Escorp that it was not reasonable for it to invest in special telephone equipment. But, a reasonable accommodation may include modifying equipment or devices. (*Id*. at § 7293.9, subd. (a).) One such modification was either an answering machine or call forwarding. Escorp argues that neither would have aided Rebhan if she had an insulin reaction after she answered a call. True enough. But Rebhan was not fired because she left a caller on hold or answered a call while having a reaction. She was fired because she had an insulin reaction away from the telephones. She had previously had a reaction while acting as the receptionist and had been unable to answer the telephones. Contrary to Escorp's argument, she was never reprimanded for incoherency or slurred speech; the warning she received related to her inability to answer incoming telephone calls. The answering machine would have solved that problem. Indeed, Escorp used that backup system when Rebhan took breaks and could not be relieved by other personnel.

Escorp's remaining arguments have been considered and merit no further discussion.

Attorneys Fees

As the prevailing party, Rebhan was entitled to fees under section 12965, subdivision (b).[8] In calculating the amount of fees, the court first established a lodestar figure by determining a reasonable hourly fee per legal professional and multiplying that number by the hours expended by each legal professional. The court used a 1.75 multiplier to enhance the sum owed to Rebhan's trial counsel. It did so by concluding that this case presented difficult legal questions in light of the *Sutton* decision, and by considering the quality of Rebhan's counsel's representation and the risk her counsel took in prosecuting this action. It also pointed to the aggressive tactics of opposing counsel, which included three summary judgment motions, and their failure to engage in good faith settlement discussions.

The trial court impermissibly applied the multiplier to enhance the fees. The quality of representation and the difficulty of the legal representation are already encompassed in the lodestar. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138-1139, 1142.) Moreover, the risk that Rebhan's attorneys would not be compensated for their work was no greater than the risk inherent in any contingency fee case. But, because of the availability of statutory fees, the possibility of receiving compensation for litigating the case was greater than in most contingency fee actions once Rebhan prevailed at trial. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1174.)

We reject Rebhan's argument that this is a classic situation justifying the multiplier. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48 (*Serrano III*).) Unlike *Serrano III*, this case did not involve a benefit to the public but was the equivalent of a personal injury suit. Thus, we cannot find sufficient public or private reason in the factors cited by the trial court for the use of a 1.75 multiplier. (*Id*. at p. 49 [judgment of trial court "'. . . will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citations.]"].)

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[8] That section reads, in pertinent part: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees . . . ."

The order awarding attorneys fees is reversed and remanded to the trial court for recalculation of attorneys fees consistent with this opinion. In all other respects the judgment is affirmed. Rebhan is awarded attorneys fees and costs on appeal, in an amount to be determined on motion in the trial court. (§ 12965, subd. (b); Cal. Rules of Court, rule 870.2(c)(1).)

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Harry E. Woolpert, Judge

Superior Court County of San Luis Obispo

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